Nos. 92-264 and 92-280

In The Supreme Court of the United States

October Term, 1992

Arcadia, Ohio, *et al.*,

Petitioners,

v.

Ohio Power Company, *et al.*,

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Federal Energy Regulatory Commission,

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MOTION FOR LEAVE TO FILE A JOINT BRIEF AS AMICI CURIAE AND JOINT BRIEF OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, THE OHIO OFFICE OF CONSUMERS' COUNSEL, ELECTRICITY CONSUMERS RESOURCE COUNCIL, INDUSTRIAL ENERGY CONSUMERS, AND INDUSTRIAL ENERGY USERS-OHIO AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The National Association of State Utility Consumer Advocates (NASUCA), the Ohio Office of Consumers' Counsel (OCC), the Electricity Consumers Resource Council (ELCON), the Industrial Energy Consumers (IEC) and the Industrial Energy Users-Ohio (IEU-OH), hereby request, pursuant to Rule 37 of the Rules of this Court, leave to file the accompanying joint brief as amici curiae in support of petitioners. NASUCA, OCC, ELCON, IEC and IEU-OH obtained consent of the petitioners of the filing of

this brief.[1] However, respondents' consent was limited to NASUCA, OCC and ELCON. Accordingly, this motion is being submitted so that IEC and IEU-OH can be included as amici curiae for purposes of this proceeding.

NASUCA members are the state-designated representatives of the interests of utility consumers in proceedings before state and federal utility commissions and courts. More particularly, NASUCA members represent millions of retail electricity consumers in 38 states and the District of Columbia.

Since its founding in 1979, NASUCA has served as a national voice for the investor-owned utility consumers who are represented by NASUCA's individual state members. NASUCA and its members have participated in major proceedings before state and federal regulatory agencies; testified on numerous occasions before state legislatures and the Congress; and submitted briefs in cases such as this one which have important impacts on consumers throughout the Nation.

The goal of NASUCA members in all proceedings is to insure that all ratepayers - particularly the captive customers of regulated monopoly utilities - receive safe and adequate service at just and reasonable rates.

OCC was established in the fall of 1976 by the 111th Ohio General Assembly, to represent the residential utility consumers of Ohio's investor-owned electric, natural gas, telephone and water companies. Ch. 4911, Page's Ohio Rev. Code. OCC represents the interests of approximately 4 million Ohio residential utility consumer households in various proceedings concerning water, gas, telephone and electric utilities, including rate cases, fuel adjustment cases and other proceedings before the Public Utilities Commission of Ohio (PUCO), the Federal regulatory commissions, and in the Federal and state courts. OCC also has presented testimony before state and Federal legislators and participated in

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1 Letters of consent from petitioners have been filed with the Clerk by separate letter. Respondents have consented to submission of a brief by ELCON, OCC and NASUCA. Respondent's consent letters with regard to ELCON, OCC and NASUCA have also been submitted to the Clerk.

many administration initiatives (such as the U.S. Secretary of Energy's Advisory Board relative to the National Energy Strategy), and similar initiatives to review legislation and rules affecting utility regulation in Ohio.

ELCON is an association of industrial energy users organized to promote the development and adoption of coordinated and rational federal and state policies that will assure an adequate, reliable and efficient electricity supply for all users based on the costs incurred in providing such service.[2] ELCON member companies own and operate manufacturing and other facilities throughout the United States (including within the territory served by Ohio Power Company) and in many foreign countries. ELCON's 21 member companies consume more than 4% of all electricity in the United States. ELCON has a longstanding interest in matters related to the price and availability of public utility service and certain ELCON members have actively sought relief from the high cost of Ohio Power Company's (OPCo) affiliate coal in proceedings before the PUCO.

IEC is an ad hoc association of large industrial customers[3] of OPCo or other operating companies within the system of the American Electric Power Company (AEP). IEC has actively participated in various state proceedings concerning the price and availability of electricity purchased at retail by its members from AEP operating companies. IEC's members purchase about 15% of the electricity sold by OPCo.

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2 ELCON's members are Air Products and Chemicals, Inc., Airco Industrial Gases, Inc., American National Can Corporation, Amoco Corp., Anheuser-Busch Companies, Inc., Armco Inc., Bethlehem Steel Corporation, Central Soya Company, Inc., Cone Mills Corporation, Dow Chemical, U.S.A., Eastman Chemical Company, E.I. du Pont de Nemours & Co., FMC Corporation, General Motors Corporation, Hoechst Celanese Corporation, LTV Steel Company, Owens-Corning Fiberglas, Praxair, Inc. (formerly Union Carbide Industrial Gases), Republic Engineered Steels, Inc., A.E. Staley Manufacturing Company and The Timken Company.

3 IEC's members are Anheuser-Busch Co., Inc., Aristech Chemical Corp., Armco Advanced Materials, BP Oil Company, General Motors Corporation, LTV Steel Company, Owens-Corning Fiberglas, Owens-Illinois, Inc., Republic Engineered Steels, Inc., Stone Container Corporation and The Timken Company.

IEU-OH is an Ohio association of large industrial retail customers[4] of Ohio electric and natural gas utilities. It seeks to promote rational and consistent energy policies and practices in Ohio, including policies and practices related to the ratemaking treatment of transactions between affiliated firms. IEU-OH's members spend about $300,000,000 per year to obtain electricity and natural gas supplied in Ohio.

IEC's members and many members of IEU-OH have actively participated in PUCO proceedings in which they have sought relief from the high cost of OPCo's affiliate coal.

NASUCA, OCC, ELCON, IEC and IEU-OH and their respective members are active participants before state and federal regulatory agencies and seek to protect the interests of ultimate or retail electricity consumers. While these organizations do not always agree, their representation of retail consumers brings them before this Court with a common objective. As captive utility customers or the designated representatives of such customers, the members of each of these organizations have suffered from abusive transfer pricing of affiliated firms subject to PUHCA. NASUCA, OCC, ELCON, IEC and IEU-OH offer the perspective of ultimate consumers damaged by excessive utility charges that result from utility purchase decisions driven by corporate affiliation rather than the quality and cost of the goods or services.

The cost of fuel, such as coal, used to generate electricity is one of the largest categories of costs incurred to generate, transmit and distribute electricity. Large industrial customers are particularly sensitive to electric utilities' fuel costs. For example, about 50% of the price of electricity purchased from OPCo by members of IEC results from the price OPCo pays for fuel (primarily coal) used to generate electricity. A change in the price of electricity of no more than one-tenth of one cent ($.001) can change a large industrial's annual electricity bill by over $1,000,000.

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4 IEU-OH's members are Airco Industrial Gases, Anheuser-Busch Co., Inc., Aristech Chemical Corp., Armco Advanced Materials, BP Oil Company, Libbey-Owens Ford Co., Owens-Corning Fiberglas, Owens-Illinois, Inc., Praxair, Inc. (formerly Union Carbide Industrial Gases, Inc.), Republic Engineered Steels, Inc., Stone Container Corporation and The Timken Company.

Due to their experience and interest in regulatory proceedings, NASUCA, OCC, ELCON, IEC and IEU-OH provide a unique perspective for this Court's consideration. These organizations have combined in the hope that their common perspective on issues presented by petitioners will assist the Court in evaluating the decision of the United States Court of Appeals for the District of Columbia.

For the foregoing reasons, NASUCA, OCC, ELCON, IEC and IEU-OH respectfully request Leave to File the attached Joint Brief as Amici Curiae in Support of Petitioners.

Respectfully submitted,

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QUESTIONS PRESENTED

NASUCA, ELCON, OCC, IEC and IEU-OH adopt the questions presented to this Court as contained in the Petitions for Certiorari.

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The National Association of State Utility Consumer Advocates (NASUCA), the Ohio Office of Consumers' Counsel (OCC), the Electricity Consumers Resource Council (ELCON), the Industrial Energy Consumers (IEC) and the Industrial Energy Users-Ohio (IEU-OH), pursuant to the Rules of the Supreme Court of the United States, hereby submit this brief as amici curiae, in support of the "Petition for a Writ of Certiorari" and "Petition for a Writ of Certiorari to the United States Court of Appeals for the

District of Columbia" filed on August 10, 1992 and August 12, 1992, respectively, by petitioners (the Petitions for Certiorari).

NASUCA, OCC, ELCON, IEC and IEU-OH (Amici) adopt the citation of decisions (opinions below), statement of jurisdiction, statement of authorities involved and statement of the case set forth in the Petition for Certiorari filed by petitioner, Arcadia, Ohio, *et al.* Amici also adopt the description of the parties to the proceeding contained in the Petitions for Certiorari.

REASONS FOR GRANTING THE PETITIONS

I. SUMMARY

In the opinion below, the court of appeals, on remand from this Court, again vacated a decision of the FERC that excluded from a determination of wholesale rates a portion of the payments made by Ohio Power Company (OPCo) to its wholly-owned and affiliated coal supplier. The FERC ruled that this disallowance was necessary to determine the revenue that OPCo could lawfully collect from its wholesale customers, to establish just and reasonable wholesale rates, to promote economic efficiency as contemplated by Sections 205 and 206 of the FPA, 16 U.S.C. §§824d and 824e, and to protect against self-dealing and abusive transfer pricing practices by affiliates, all in the context of the exercise of the FERC's ratemaking authority. In vacating the FERC's decision, the court of appeals improperly applied the FERC's regulation which considers the Securities and Exchange Commission's (SEC) approval of interaffiliate sales, *see* 18 C.F.R. §35.14(a)(7), and wrongly held that the FERC was obliged to accept without question an "at cost" pricing determination that the court of appeals found in the SEC's limited pronouncements regarding OPCo's capitalization of its affiliate coal company.

Amici collectively participate in hundreds of retail ratemaking proceedings each year throughout the United States. Many of these proceedings require detailed examination of affiliate transactions by companies subject to PUHCA for purposes of determining utility revenue requirements that fairly balance the interests of ratepayers and utility owners. As suggested in the Petitions for

Certiorari, the court of appeals' decision has been, and will continue to be, cited as a ruling that bars state regulatory authorities from exercising their traditional powers to investigate and adjust prices for goods and services flowing between affiliates subject to the PUHCA. If the court of appeals' decision is permitted to stand, state regulatory authorities will be unable to adopt results that simulate the forces which competitive markets would impose upon utilities but for their monopoly status and thereby establish retail utility rates which are just and reasonable.

Amici submit that the decision of the court of appeals warrants this Court's review. First, the decision below conflicts with *Arcadia, Ohio v. Ohio Power Co.*, _____ U.S. _____, 111 S.Ct. 415, 112 L.2d 374 (1990). Second, the lower court has established a legal principle that inappropriately subordinates the FERC's ratemaking responsibilities to the SEC's authority under the PUHCA. Third, the court of appeals' unnecessarily sweeping conclusion regarding the SEC's authority to establish conclusively the prices for goods or services transferred by affiliates subject to the PUHCA will frustrate efforts to set just and reasonable retail utility rates. Congress could not have intended any of these results.

Amici will devote their efforts to urge this Court to consider the implications of the lower court's decision upon retail ratemaking in the several states.

II. THE DECISION BELOW WILL IMPEDE THE ESTABLISHMENT OF JUST AND REASONABLE RETAIL RATES

As a practical matter, the lower court's decision suggests that PUHCA inter-affiliate transactions concerning non-utility property can be structured on a cost plus basis and thereby enjoy an economic safe harbor which is unavailable to independent suppliers that must compete in the marketplace. If left undisturbed, the lower court's decision will promote affiliate relationships, inefficient or uneconomical affiliate transactions and vertical integration by utilities. This contrasts sharply with any policy objective discernable from the PUHCA and the many laws and cases that express the policy of the states. In addition, many states are implementing programs that encourage utilities to use

competitive bidding for supply and demand-side resources to evaluate utility performance. The lower court's decision suggests that distorted PUHCA structures may be used to evade efforts to promote efficiency and evaluate objectively the performance of monopoly utility suppliers.

Retail ratemaking authorities and state legislatures have enacted and applied specific rules for the examination and treatment of transactions between companies affiliated with public utilities. Through administrative case law and specific statutory commands, state regulatory authorities have examined the price of goods or services purchased by utilities from affiliate suppliers by reference to the cost of such goods and services as would have been established by arms length transactions.

Indeed several retail ratemaking authorities with jurisdiction over AEP operating companies have reviewed purchases of coal from AEP affiliate mines. For example, in 1979, the Michigan Public Service Commission (Mich. PSC) issued a retail rate order applicable to Indiana & Michigan Electric Company (I&M). In fulfilling its ratemaking responsibilities, the Mich. PSC reviewed the pricing of coal purchased from I&M's affiliated coal mine. During the proceeding, I&M urged the Mich. PSC to adopt I&M's characterization of the SEC's cost plus pricing claiming (somewhat ironically) that market-based pricing would lead to prices substantially above prices based on the SEC's cost plus standard. In other words, I&M argued that market-based pricing would ultimately lead to higher rates than the cost plus standard it favored. However, the Mich. PSC determined that a market-based price for the affiliate coal was fair and provided the appropriate incentive for efficient inter-affiliate purchase decisions.

> The Commission FINDS that the 90-day rolling average market price as proposed by the Staff is the pricing basis for Braztah coal which is most equitable to both Applicant and its ratepayers. The Braztah coal mine is a nonjurisdictional operation,[1] which means that the Braztah investment is not

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1 Affiliate investments are frequently treated as nonjurisdictional or "below-the-line" operations for ratemaking purposes.

included in Applicant's rate base and that this Commission cannot regulate directly the operations of the Braztah mine or the price of the Braztah coal. Although it has treated similar investments by other utilities on a case-by-case basis, the Commission in recent years has most often allowed for ratemaking purposes the market price of fuel sold by an affiliated company to a regulated utility. The effect on pricing affiliated fuel at market is to allocate the risk and the benefit of the nonjurisdictional investment to the utility. This allocation of risk and benefit is consistent with the allocation made in the nonregulated sector of the economy and is ordinarily assumed to be fair. The further effect of pricing affiliated fuel at market is to provide the affiliate company with an incentive to operate efficiently. This incentive is likewise consistent with that which exists in the nonregulated economic sector. Pricing affiliated fuel at cost plus, as proposed by Applicant, at least provides no incentive for efficient operation and may provide a positive incentive for inefficient operations, the total cost of which would be borne by Applicant's ratepayers.

There may be circumstances to which cost-plus treatment of sales of fuel by an affiliated enterprise to the regulated utility is justified, but the Commission finds no such justification here. The Commission is not persuaded that the coal price or supply situation was, or is, so critical as to necessarily lead Applicant to acquire its own coal supplies in order to continue to provide adequate service to its customers. There is simply no justification in this record for requiring Applicant's ratepayers to guarantee a return on the Braztah coal venture.

In Re Application of Indiana & Michigan Electric Company, Case No. U-5608 at 71; (Mich.PSC, April 10, 1979).

In Ohio, the cost of coal used to generate electricity is subject to recovery through a statutorily authorized fuel adjustment clause. Ohio Rev. Code Ann. §4905.191 (Page's 1992). However, the coal cost subject to recovery through Ohio's fuel adjustment clause in the case of coal purchased from a supplier owned in whole or part by the electric utility shall:

> ...not exceed a price that is, in the judgment of the public utilities commission, reasonable when compared to the average cost per million British thermal units of similar quality coal purchased from all independent like mining operations under similar term contracts during the same period.

Ohio Rev. Code Ann. §4905.01(F) (Page's 1992)

In a case involving another AEP operating company (Columbus Southern Power Company or CSP), the Public Utilities Commission of Ohio (PUCO) rejected OCC's argument that retail ratepayers should benefit from again realized upon sale of an affiliate coal mine. The PUCO accepted CSP's argument that ratepayers were not entitled to the gain since the affiliate mine was not utility property and its shareholders had accepted the risks associated with its operation. *In Re Columbus Southern Power Company*, Case No. 88-102-EL-EFC; 1988 Ohio PUC Lexis 995 at *33 (PUCO October 28, 1988). At the risk of highlighting the obvious, CSP's "below-the-line" treatment of gains realized from the sale of affiliate coal mines, when combined with OPCo's (a sister company) insistence on cost plus coal prices when cost plus exceeds market, creates a ratepayer trap rather than a cost trap. The "below the line" treatment of affiliate investments for ratemaking purposes and its significance relative to the allocation of risks associated with non-utility property investments between ratepayers and utility owners are factors which cause Amici to conclude that the court of appeals' concern about a potential cost trap is misplaced in this context.

The above decisions by the PUCO and the Mich. PSC and Ohio's law concerning the price of coal obtained by public utilities from affiliate suppliers, are illustrative of the regulatory framework throughout the United States. While the decision of the lower court

does not directly address the relationship between the SEC's power and the powers of state regulatory authorities, the lower court's decision sounds an alarm to those, such as Amici, charged with the responsibility of protecting the interests of ultimate consumers of utility services. Amici share petitioners' concerns about the ultimate effect of the lower court's decision upon the power of the states, as exercised in past cases and as needed in the future.

CONCLUSION

The Petitions for Certiorari should be granted.

Respectfully submitted,

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	)	
v.	)	
	)	
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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of September, 1992, three copies of the foregoing Motion and attached Joint Brief were served by ordinary mail, postage prepaid, on the following counsel:

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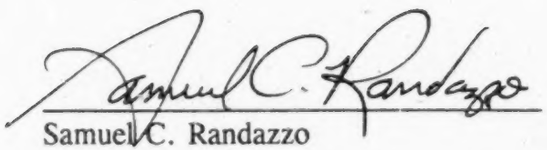

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